Childcare Triggers Duty To Accommodate Family Status In The Workplace

written by Rory Lodge | November 4, 2014

The law regarding the duty of employers to accommodate the family-related needs of employees has been evolving over the past few years. Courts and tribunals have grappled with where the balance lies between family and work obligations; and where the duty to accommodate begins. On May 2, 2014, the Federal Court of Appeal released two anticipated decisions on this point, *Canada (Attorney General) v Johnstone* (*Johnstone*) and *Canadian National Railway v Seeley* (*Seeley*).

Background

The facts in both cases are similar: the employee, a mother of young children, asked her employer to alter her schedule or assignment to ensure her children were provided with adequate childcare. These requests were denied. Both mothers filed complaints which were ultimately addressed by the Canadian Human Rights Tribunal (CHRT). The CHRT found that the employer had failed to accommodate and had engaged in discrimination based on family status, contrary to the *Canadian Human Rights Act*. The decisions were judicially reviewed, and in both cases the Federal Court upheld the CHRT's decision. The Federal Court's decision was appealed to the Federal Court of Appeal (FCA), which dismissed the employers' appeals, upheld the CHRT's decision, and discussed an employer's duty to accommodate family status.

Legal Test To Trigger An Employer's Duty To Accomodate

The FCA first outlined the two-part test to determine whether there is discrimination on the prohibited ground of family status. First, the complainant must make a *prima facie* case of discrimination. Second, the onus shifts onto the employer, who must demonstrate that the policy is a *bona fide* occupational requirement, and that accommodation would amount to undue hardship. To make out a *prima facie* case, the individual advancing the claim must show:

(i) that a child is under his or her care and supervision;(ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as

opposed to a personal choice;

(iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and

(iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.[1]

The *prima facie* case must be analyzed in a flexible and contextual manner. While specific examples of what type of evidence would meet the newly articulated four-factor test was not provided, the court suggests a case-by-case approach.

Furthermore, the FCA underscored that the spirit of human rights legislation must be kept in the foreground, and should be interpreted broadly, purposively, and flexibly. Although *Johnstone* and *Seeley* relied on the *Canadian Human Rights Act*, they provide persuasive arguments for claims arising out of the Ontario *Human Rights Code*.

Aftermath And New Path For Employers

The Ontario *Human Rights Code* defines "family status," while the *Canadian Human Rights Act* does not. These recent cases make it clear that family status includes family and parental obligations, which extends to childcare obligations. However, the FCA also makes it clear that only needs (and not preferences) must be accommodated.

Federally regulated employers will be bound by the decisions in *Johnstone* and *Seeley*. Employers regulated by Ontario legislation do not technically fall under the same legal scope, but it would be prudent of all employers to ensure that their family status accommodation efforts meet the thresholds annunciated in *Johnstone* and *Seeley*. When considering the duty of accommodation of family status, employers should consider:

- Investigation: Initiate a genuine and good faith investigation of each request by engaging in meaningful dialogue with the employee;
- Cooperation: When appropriate, develop an accommodation strategy with the employee to ensure the needs of both parties are met;
- Flexibility: Create and administer policies that are flexible, update outdated workplace policies; and consider all the possible options, while keeping in mind the demands of the work in question;
- Follow-up: Check in with your employee periodically, evaluate the success of the accommodation strategy, and make adjustments accordingly;
- Documentation: Ensure all the requests made by employees and responsive steps taken by the employer, as well as the reasoning behind such decisions, are documented in detail; and
- Evidence: Collect information, objective evidence, and documentation demonstrating undue hardship, such as a change in productivity; and *bona fide* occupational requirements.